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Endorsed  
Filed  
Alameda County

Nov. 13, 2002

Clerk of the Superior Court  
By S. Jones, Duputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF ALAMEDA

PEOPLE OF THE STATE OF CALIFORNIA, ex rel. Edwin F. Lowry, Director, Department of  
Toxic Substances Control,

Plaintiffs,

v.

TECHNICHEM, INC., a California Corporation;  
MARK J. NG, an individual,

Defendants

1.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT MOTION TO ENFORCE PARTIAL  
CONSENT DECREE AND SEEK PENALTIES

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Defendants

Plaintiff People of the State of California, ex rel. Edwin R. Lowry, Director, Department  
of Toxic Substances Control (hereinafter DTSC) submit the following memorandum of points  
and authorities in support of the motion to enforce provisions of the Partial Consent and Order  
for Injunctive Relief (Partial Consent Decree) against Technichem, Inc., (Technichem) in this

4.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT MOTION TO ENFORCE PARTIAL  
CONSENT DECREE AND SEEK PENALTIES

matter. Further, DTSC seeks penalties as stipulated in the Partial Consent Decree, in the amount of \$1,440,000.

## **I.**

### **ISSUE**

Technichem is required to comply with its hazardous waste permit and additional requirements as specified in the Partial Consent Decree. (Partial Consent Decree ¶5.) Violations of the Partial Consent Decree carry stipulated penalties of \$10,000 per violation, per day. (Partial Consent Decree ¶9.) Technichem has repeatedly violated the Partial Consent Decree, discussed below, including exceeding its monthly limit of hazardous waste, aisle space, failure to label incoming waste and illegal storage of hazardous waste. The question is whether these stipulated penalties can be imposed. DTSC believes that the stipulated penalties can and should be imposed for the reasons set forth below.

## **II.**

### **BACKGROUND**

The court signed the Partial Consent Decree on June 28, 2000. The Partial Consent Decree anticipates that Technichem would obtain a DTSC approved final hazardous waste facility permit to replace its existing permit. (Partial Consent Decree ¶5.) Until such time as Technichem obtains a new DTSC approved hazardous waste permit, in this case a Standardized Permit, Technichem is required to comply with paragraphs 7 and 8 of the Partial Consent Decree. (Partial Consent Decree ¶5.) DTSC has not issued a Standardized Permit to Technichem. The court retains jurisdiction to enforce paragraphs 7, 8 and 9 until Technichem obtains its new permit. (Partial Consent Decree ¶5.) Technichem shall be liable for a stipulated penalty of \$10,000 per day for each violation of the Partial Consent Decree provisions. (Partial Consent Decree ¶9.)

On June 1, 2001, DTSC provided Notice of a Final Permit Decision to issue a Standardized Hazardous Waste Facility Permit to Technichem. (See Exhibit A, Notice of Final

Permit Decision.) Technichem's Standardized Hazardous Waste Facility Permit was attached to the Notice of Final Permit Decision. (See Exhibit B, Standardized Hazardous Waste Facility Permit (Standardized Permit).) The Notice indicates the final Standardized Permit would become effective on July 9, 2001, subject to a 30 day administrative appeal period pursuant to California Code of Regulations (Cal. Code Regs.), title 22, section 66271.18. (See Exhibit A, Notice of Final Permit Decision.)

On July 6, 2001, the City of Emeryville filed an appeal of the final permit decision. (See Exhibit C, City of Emeryville's Appeal of Final Permit Decision (Emeryville's Permit Appeal).) Technichem filed an appeal on July 9, 2001. (See Exhibit D, Technichem's Request for Review, Permit Decision (Technichem's Permit Appeal).)

On August 2, 2001, DTSC acknowledged receipt of the appeals by the City of Emeryville and Technichem. (See Exhibit E, Acknowledgment of Receipt of Request for Review, Final Permit Decision; Notice of Ineffectiveness/Stay of Permit to the City of Emeryville (Emeryville's Permit Appeal Acknowledgment); and Exhibit F, Acknowledgment of Receipt of Request for Review, Final Permit Decision; Notice of Ineffectiveness/Stay of Permit to Technichem (Technichem's Permit Appeal Acknowledgment).) Emeryville's Permit Appeal Acknowledgment mentioned and attached Technichem's Permit Appeal. (See Exhibit E, Emeryville's Permit Appeal Acknowledgment, p. 2, ¶1.) Similarly, Technichem's Permit Appeal Acknowledgment mentioned and attached Emeryville's Permit Appeal Acknowledgment. (See Exhibit F, Technichem's Permit Appeal Acknowledgment, p. 2, ¶1.)

Technichem is required to operate pursuant to the provisions of the Partial Consent Decree since the permit appeal has not been resolved by DTSC. However, Technichem claims that the Partial Consent Decree is no longer effective and that it may, instead, operate under the stayed permit.

### III.

#### ARGUMENT

##### **A. Technichem's Standardized Permit Never Became Final**

Technichem claims it has been issued a Standardized Permit and thus, the court has lost its jurisdiction to enforce the hazardous waste requirements of the Partial Consent Decree. However, as discussed below, there is no factual or legal support for Technichem's assertion. Technichem's Standardized Permit never became effective and therefore the court never lost its jurisdiction to hold Technichem accountable for violations of the Partial Consent Decree.

On August 2, 2001, DTSC's Dorothy Rice notified both the City of Emeryville and Technichem that the "contested permit is ineffective pending request for review and stayed pending any grant of review." (See Exhibit E, Emeryville's Permit Appeal Acknowledgment, p. 2, and Exhibit F, Technichem Permit Appeal Acknowledgment, p. 2.) Ms. Rice's letter references Cal. Code Regs., title 22, section 66271.14(b)(2) which states:

(b) A final permit decision . . . shall become effective 30 days after the service of notice of the decision unless:

(2) review is requested under section 66271.18[.]”

As mentioned above, both the City of Emeryville and Technichem appealed DTSC's permit decision. (See Exhibit C, Emeryville's Permit Appeal, and Exhibit D, Technichem's Permit Appeal.) Consequently, the permit did not become final and effective pursuant to Cal. Code Regs., title 22, section 66271.15. Since Technichem has not secured a final hazardous waste permit, the court retains its jurisdiction to enforce the provisions of the Partial Consent Decree. (Partial Consent Decree, ¶5.)

##### **B. Technichem May Not Operate Under the Appealed Standardized Permit**

Technichem claims that, even if its Standardized Permit is not final, it may still operate under those provisions in the Standardized Permit that were not appealed. DTSC assumes that

Technichem's position is that these unappealed provisions of the Standardized Permit somehow modify the Partial Consent Decree requirement for Technichem to obtain from DTSC an approved final hazardous waste permit. (Partial Consent Decree, ¶5.) Assuming, for the sake of discussion, that the Partial Consent Decree could be modified by Standardized Permit provisions that have not been appealed, Technichem's argument still fails.

### **1. DTSC Stayed the Entire Permit Pending Resolution of Any Grant of Review**

As discussed above, both the City of Emeryville and Technichem were informed by DTSC that the entire permit was stayed pending a grant of review. (See Exhibit E, Emeryville's Permit Appeal Acknowledgment, p. 2, and Exhibit F, Technichem Permit Appeal Acknowledgment, p. 2.) DTSC has not granted the request for review. (See Declaration of Dorothy Rice.) Ms. Rice's letters are not grants for request of review. (See Exhibit E, Emeryville's Permit Appeal Acknowledgment, p. 2, and Exhibit F, Technichem Permit Appeal Acknowledgment, p. 2.)

However, to the extent that it is contended that Ms. Rice's letters are grants of request of review of the permit, then the provisions of Cal. Code Regs., title 22, section 66271.15(a)(2) are instructive. This section states, in part, "Stayed provisions of permits for existing facilities shall be identified by the Department." Here, as mentioned above, the "contested permit is ineffective pending request for review and stayed pending any grant of review." (See Exhibit E, Emeryville's Permit Appeal Acknowledgment, p. 2, and Exhibit F, Technichem Permit Appeal Acknowledgment, p. 2.) Consequently, there are no unstayed provisions of the permit under which Technichem may operate.

### **2. All Provisions of Standardized Permit Were Appealed**

Technichem cannot point to a single permit condition that has not been appealed by either the City of Emeryville or by Technichem. The City of Emeryville's Permit Appeal states: However, a facility like Technichem can only work here [in Emeryville] if it is appropriately located given surrounding land uses; if it operates properly and in conformance with applicable laws; and if its impacts have been adequately reviewed. At this point, we do not believe this is the case with Technichem and strongly urge you [DTSC] to reconsider the issuance of a

Final Permit to Technichem at this time.

(See Exhibit C, Emeryville's Permit Appeal, p. 1, third paragraph.) Clearly, Emeryville has appealed Technichem's entire permit.

Technichem also appealed virtually all provisions of the Standardized Permit. (See Exhibit D, Technichem's Permit Appeal.) In its Permit Appeal cover letter, Technichem objects to the "over sixty (60) separate 'special conditions' that make facility operation nearly an impossible act." (See Exhibit D, Technichem's Permit Appeal, cover letter, pp. 1-2.)

The Standardized Permit contains sixty-four special conditions that include: acceptance, treatment or storage limits of 2,000 gallons of hazardous waste per month (Exhibit B, Standardized Permit, Special Conditions 2, 3 and 59, pp. 16 and 27); aisle space (Exhibit B, Standardized Permit, Special Condition 28, p. 20); labeling requirements (Exhibit B, Standardized Permit, Special Conditions 4, 5 and 6, pp. 16-17); and storage (See Exhibit B, Standardized Permit, Special Conditions 22, 33, 46, and 47).

Technichem appealed most of the Standardized Permit conditions including the following: acceptance, treatment or storage limits of 2,000 gallons of hazardous waste until Technichem has secured a modification of its existing Conditional Use Permit from the City of Emeryville (See Exhibit D, Technichem's Permit Appeal, p.14, ¶30); aisle space (Exhibit D, Technichem's Permit Appeal, p.8, ¶17); labeling requirements (Exhibit D, Technichem's Permit Appeal, pp. 4-5, ¶¶7-8); and storage and vehicle parking (Exhibit D, Technichem's Permit Appeal, pp.3-4, ¶¶6(1)-6(2)). The City of Emeryville has not granted Technichem a modification of its Conditional Use Permit. (See Exhibit C, Emeryville's Permit Appeal, pp. 5-7.)

### **3. All Provisions that DTSC Seeks to Enforce Were Appealed**

DTSC seeks to enforce those provisions of the Partial Consent Decree that regulated Technichem's acceptance, treatment or storage limit, aisle space requirements, labeling

requirements and storage and parking requirements. (See section IV below.) As discussed above, Technichem appealed the Standardized Permit provisions that address these issues.

#### **IV.**

#### **VIOLATIONS OF THE PARTIAL CONSENT DECREE**

Technichem has committed extensive violations of the Partial Consent Decree. These violations, as outlined below, stretch over several years.

##### **A. Monthly Acceptance, Storage or Treatment Limits Violations**

The Partial Consent Decree provides that “Technichem shall only accept, store or treat 7,000 gallons total of hazardous waste or 2,000 gallons of perc (determined as a percentage of hazardous waste accepted at the facility), whichever is less, in any calendar month.” (Partial Consent Decree, ¶7(B)(2).) Any wastewater that Technichem accepts shall be included in its 7,000 gallon input limitation. (Partial Consent Decree, ¶7(A)(6)(b).) Technichem is required to maintain daily logs stating the quantity of hazardous waste accepted. (Partial Consent Decree, ¶7(B)(2).)

On June 13, 2002, Technichem, in response to a request by DTSC, submitted a Monthly Incoming Waste Log for July 2001 through May 2002. (See Exhibit G, Technichem’s Monthly Incoming Waste Volume Logs (Monthly Logs).)<sup>1</sup> These logs evidence that Technichem was in violation of its acceptance, storage or treatment limits for 138 days. Consequently, DTSC is entitled to penalties of \$1,380,000 pursuant to the Partial Consent Decree.

The calculations set forth below are based upon the figures set forth in Exhibit G, Technichem’s Monthly Logs for any given month. For the convenience of the reader, an Excel document has been generated for the months in question that has a running total of gallons in the left hand column. (See Exhibit H, Excel calculations.) Further, the Excel calculations are based only upon the first two columns of Exhibit I for a given month. The first column for any given

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<sup>1</sup>The original of Exhibit G, Technichem’s Monthly Logs are not consecutively paginated. Page numbers have been added for the ease of referencing a given log.

month on Exhibits G and H denote distillation bottoms and the second column denotes wastewater contaminated with perc. (See Partial Consent Decree ¶¶7(A)(6)(b) and 7(B)(2).) Lastly, the calculations are based upon the assumption that Technichem had treated all the waste from the previous month and could accept its full 7,000 gallon limit for any given month.

1. May 2002

Technichem's Incoming Waste Volume Log indicates that it received over 11,000 gallons of hazardous waste in May 2002. (See Exhibit G, pp. 23 -24; and Exhibit H, pp 23-24.) Technichem exceeded its monthly acceptance limit on May 18, 2002. (See Exhibit G, p. 23 and Exhibit H, p. 24.) In May 2002, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 14 days.

2. April 2002

Technichem's Incoming Waste Volume Log indicates that it received over 9,500 gallons of hazardous waste in April 2002. (See Exhibit G, pp. 21-22; and Exhibit H, pp. 21-22.) Technichem exceeded its monthly acceptance limit on April 20, 2002. (See Exhibit G, p. 21; and Exhibit H, p. 21.) In April 2002, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 11 days.

3. March 2002

Technichem's Incoming Waste Volume Log indicates that it received over 12,000 gallons of hazardous waste in March 2002. (See Exhibit G, pp. 19-20; and Exhibit H, pp. 19-20.) Technichem exceeded its monthly acceptance limit on March 16, 2002. (See Exhibit G, p. 20; and Exhibit H, p. 20.) In March 2002, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 16 days.

4. February 2002

Technichem's Incoming Waste Volume Log indicates that it received over 12,000 gallons of hazardous waste in February 2002. (See Exhibit G, pp. 17-18; and Exhibit H, pp. 17-18.) Technichem exceeded its monthly acceptance limit on February 16, 2002. (See Exhibit G,

p. 17; and Exhibit H, p. 17.) In February 2002, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 13 days.

5. January 2002

Technichem's Incoming Waste Volume Log indicates that it received over 9,700 gallons of hazardous waste in January 2002. (See Exhibit G, pp. 15-16; and Exhibit H, pp. 15-16.) Technichem exceeded its monthly acceptance limit on or before January 24, 2002. (See Exhibit G, p. 16; and Exhibit H, p. 16.) In January 2002, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for eight days.

6. December 2001

Technichem's Incoming Waste Volume Log indicates that it received over 11,000 gallons of hazardous waste in December 2001. (See Exhibit G, pp. 13-14; and Exhibit H, pp. 12-14.) Technichem exceeded its monthly acceptance limit on December 15, 2001. (See Exhibit G, p. 14; and Exhibit H, p. 13.) In December 2001, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 17 days.

7. November 2001

Technichem's Incoming Waste Volume Log indicates that it received over 9,000 gallons of hazardous waste in November 2001. (See Exhibit G, pp. 11-12; and Exhibit H, pp. 10-11.) Technichem exceeded its monthly acceptance limit on November 20, 2001. (See Exhibit G, p. 12; and Exhibit H, p. 11.) In November 2001, Technichem was in violation of the Partial Consent Decree, ¶7(B)(2), for 11 days.

8. October 2001

Technichem's Incoming Waste Volume Log indicates that it received over 9,000 gallons of hazardous waste in October 2001. (See Exhibit G, pp. 9-10; and Exhibit H, pp. 8-9.) Technichem exceeded its monthly acceptance limit on October 20, 2001. (See Exhibit G, p. 10; and Exhibit H, p. 9.) In October 2001, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 12 days.

9. September 2001

Technichem's Incoming Waste Volume Log indicates that it received over 11,000 gallons of hazardous waste in September 2001. (See Exhibit G, pp. 7-8; and Exhibit H, pp. 6-7.) Technichem exceeded its monthly acceptance limit on September 20, 2001. (See Exhibit G, p. 8; and Exhibit H, p. 7.) In September 2001, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 11 days.

10. August 2001

Technichem's Incoming Waste Volume Log indicates that it received over 12,000 gallons of hazardous waste in August 2001. (See Exhibit G, pp. 4-6; and Exhibit H, pp. 3-5.) Technichem exceeded its monthly acceptance limit on August 18, 2001. (See Exhibit G, p. 5; and Exhibit H, p. 4.) In August 2001, Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 14 days.

11. July 2001

Technichem's Incoming Waste Volume Log indicates that it received over 10,500 gallons of hazardous waste in July 2001. (See Exhibit G, pp. 2-3; and Exhibit H, p. 1-2.) Technichem exceeded its monthly acceptance limit on July 21, 2001. (See Exhibit G, p. 2 and Exhibit H, p. 1.) Technichem was in violation of the Partial Consent Decree, paragraph 7(B)(2), for 11 days.

**B. Aisle Space Violation**

The Partial Consent Decree provides that "Technichem shall maintain aisle space in Areas 1 and 4 of at least thirty inches to allow unobstructed movement of personnel, fire protection equipment, spill control equipment and decontamination equipment to any of the facility operation in case of an emergency." (See Partial Consent Decree, ¶7(C), 7:4-8.)

On June 12, 2002, DTSC inspected Technichem's facility. Technichem was not maintaining thirty inches of aisle space within Area 1. DTSC inspectors found that the aisle space in this area varied from twenty-six inches to as little as three inches in some places. (See

Declaration of Luz Castillo (“Castillo Decl.”), ¶2.) Technichem was in violation of Partial Consent Decree, paragraph 7(C), for one day and liable for a \$10,000 stipulated penalty.

**C. Failure to Label Incoming Waste**

The Partial Consent Decree provides that “Technichem shall make and label all incoming DOT-approved containers of perchloroethylene (“perc”)-containing hazardous waste that are received from offsite generators and containers of newly generated sludge with different colored, large-sized placards or tags.” (See Partial Consent Decree, ¶7(A)(2), 3:15-17.) The Partial Consent Decree further requires placards or tags to contain: internal drum or container number; the type of generator; and manifest number, date and exact time to the nearest minute of waste acceptance. (See Partial Consent Decree ¶7(A)(2).)

On June 12, 2002, DTSC inspected Technichem and found four containers that were unlabeled. (See Castillo Decl. ¶3.) While labels were located near these containers, they did not bear all of the required information. (See Castillo Decl. ¶3.) Technichem was in violation of Partial Consent Decree, ¶7(A)(2), for one day and liable for a \$10,000 stipulated penalty.

**D. Hazardous Waste Storage in Unauthorized Areas**

The Partial Consent Decree provides “Technichem shall not transfer, store, treat, or process any hazardous waste in any area other than the liquid/solid strainer, which must be located in Area 4, or those areas identified on the map on Attachment A to this Consent Decree[.]” (See Partial Consent Decree paragraph 7(A)(1).)

On October 24, 2000, DTSC found that Technichem had two vehicles parked outside its facility on Halleck Street. One tractor trailer (license plate YC7994) held 64 containers of hazardous waste. (See Castillo Decl. ¶6.) The other truck (license plate D5G41515) held 36 containers of hazardous waste. (See Castillo Decl. ¶6.)

On October 27, 2000, DTSC found that truck (license plate D5G41515) still parked on Halleck Street. It still contained 36 hazardous waste drums. (See Castillo Decl. ¶8.) Truck (license plate YC7994) was no longer parked on Halleck Street. (See Castillo Decl. ¶8.)

However, another Technichem truck (license plate 3Z90216) was now parked on Halleck Street. (See Castillo Decl. ¶8.) This truck held 35 containers of hazardous waste. (See Castillo Decl. ¶8.)

Halleck Street is not identified as an area that hazardous waste may be stored by the Partial Consent Decree. Technichem was in violation of Partial Consent Decree, paragraph 7(A)(1), for four days and liable for a \$40,000 stipulated penalty.

V.

### **CONCLUSION**

The violations documented above clearly run afoul of the Partial Consent Decree's provisions. Here, Technichem unilaterally decided that it could operate under the Standardized Permit, even though it appealed the Standardized Permit and was notified that the permit was stayed pending the resolution of Technichem's and the City of Emeryville's permit appeals.

DTSC respectfully requests that the court find Technichem in violation of all the foregoing provisions of the Partial Consent Decree and impose a stipulated penalty of \$1,440,000.

Respectfully submitted,

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of the State of California  
THEODORA BERGER  
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Dated: 11/8/02

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